EXHIBIT 116

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	) MDL No. 1456) Civil Action No.) 01-12257-PBS
THIS DOCUMENT RELATES TO: United States of America ex rel. Vena-A-Care of the Florida Keys, Inc., v. Dey, Inc., et al., Civil Action No. 05-11084-PBS	) Hon. Patti B. Saris)))))

Continued Videotaped Deposition Of

THE STATE OF NEW JERSEY DEPARTMENT

OF HUMAN SERVICES by EDWARD J. VACCARO

DECEMBER 3, 2008

TRENTON, NEW JERSEY

9:04 A.M.

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that it is entirely permissible for states to use EAC to compensate pharmacists for inadequate dispensing fees; correct?

MS. YAVELBERG: Objection, form.

THE WITNESS: Repeat the question, please.

MR. KIM: Sure.

BY MR. KIM:

Q. In 1992, based on your review of this document, the Appeals Board is saying in this decision that it's entirely permissible for States to use the estimated acquisition cost, the ingredient cost portion to compensate pharmacists for inadequate dispensing fees?

MS. YAVELBERG: Objection, form.

BY MR. KIM:

Q. Do you agree or not agree?

A. I agree with the statement, yeah.

Q. Okay. And this statement is binding on HCFA?

MS. YAVELBERG: Objection, form.

BY MR. KIM:

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Q. Do you agree --

A. That's correct.

Q. -- or not agree?

A. I agree.

Q. Do you also agree that the 1994 letter that you were shown earlier does not address the separate question of whether a State could pay above an appropriately determined EAC to compensate for inadequate dispensing fees?

MS. YAVELBERG: Objection, form.

THE WITNESS: I agree.

MR. KIM: Like to mark this as -- as the next exhibit.

(Exhibit Vaccaro 024, multipage document, the first page of which is entitled medicaid Action Transmittal dated September 1984, is marked for identification.)

BY MR. KIM:

Q. Do you need a second to review the document?

A. Yes, please.

Q. Sure.

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(Reviewing document.)

A. Okay. Thank you.

Q. Okay. This appears to be a September, 1984 Medicaid transmittal attaching an OIG report from June, 1994.

MS. YAVELBERG: September.

MR. KIM: The -- the transmittal is September; right? There was a date on this document.

BY MR. KIM:

Q. Well, all right. So let's just say 1984 OIG report. The Medicaid trans -- transmittal -- action transmittal number is 84-12.

Do you see that, sir.

A. Yes, I do.

Q. It's on the front page.

And the OIG report is titled Changes To The Medicaid -- second page -- Changes To The Medicaid Prescription Pro -- Prescription Drug Program Could Save Millions.

Do you see that, sir.

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A. Yes.

Q. Would you turn to Page 3?

In the -- the first paragraph there is a sentence, I think it's the fourth one down where it starts with "AWP means," do you see that.

A. Yes.

Q. Okay. Could you just read that sentence, sir?

A. Does that sentence start with the word "Currently?"

Q. No, it's the one right below it.

A. "AWP means non-discounted list price. Pharmacies purchase drugs at prices that are discounted significantly below AWP or list price. Because of the widespread use of AWP by State Medicaid agencies, however, the Medicaid program does not receive any benefit from these discounts."

Q. Okay. That's fine.

Now, if you turn to Page 4, the -- the third paragraph, could you just read the -- the

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the -- let's go to the -- the third -- the second full paragraph first.
So if you read that paragraph, Thomas Russo is proposing a discount cutoff from $24.99 to $34.99 which will result in savings of an additional hundred thousand dollars.
Do you see that, sir.
A. Yes, I do.
Q. And when he talks -- when he's talking about discount cutoff, and I believe you testified about this yesterday, he's talking about the -- the dollar amount of the total prescription that's submitted for reimbursement; is that correct?
A. Correct.
Q. And the cutoff being that if it's under, at this time, $24.99, you would be reimbursed at the full AWP without a discount?
MS. YAVELBERG: Objection, form.
THE WITNESS: I'm trying to think.
BY MR. KIM:
Q. I could restate the question if you

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don't understand it.
A. I believe the discount applied only to claims up to a $25 cap.
Q. Right. So if it was under $25.00, then there would be no discount --
A. Correct.
MS. YAVELBERG: Objection, form.
BY MR. KIM:
Q. Okay. So what he's proposing here, Mr. Russo, to HCFA is to raise the discount cap from the 24.99 to 34.99?
A. That's correct.
Q. Okay. He's also proposing to revise the discount structure and here used the -- he's using the term structure, I just want you to take note of that, to expand the range to 1 point -- 1 percent to 10 percent from its current level 0 percent to 6 percent.
So the 0 percent to 6 percent, as you understand, is the discount off of AWP; is that correct.
A. Correct.

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Q. So what he's proposing here is to raise the discount from 0 percent to 6 percent to 1 percent to 10 percent; correct?
A. Correct.
Q. And when he's talking about the discount structure, he's talking about the discount off of AWP; is that correct?
A. Correct.
Q. Okay. Now, if you just go -- skip a paragraph and go to the paragraph that starts with: While -- while I believe, the second sentence he says, "I expect strong resistance from the provider community and a long and arduous negotiation."
What does he mean by negotiation.
A. As I indicated in testimony yesterday, we often, even back in the '80s, I would imagine, we often sat across the table from professional organizations in the State, professional pharmacy organizations, to discuss our intentions regarding changes in -- typically reimbursement, and this is an example of that.

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Q. Okay. And this is prior to Medicaid agencies submitting a State plan for approval?
A. Yes.
Q. Okay. And it is the Medicaid agency that's responsible for submitting the State plan for approval? Who submits --
A. The Department of Human Services is designated as the payor -- as the -- as the receiver of the funds from CMS. The Division is responsible for moving up the chain, if you will, any proposals that ultimately result in a change of regulations and/or the State plan to the Commissioner for his or her signature.
Q. I see. Okay.
A. I'm -- single State agency is the word I'm thinking of, that's what the department is.
Q. And you mentioned yesterday that the Appropriations Act is a legislative -- it's a legislation that is created by the -- the State legislature or --
A. Yes.
Q. -- the State Governor's office? Okay.

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industry came to the plate and said, well, you know, we'll end up -- we'll -- we'll pay more taxes on the corporate side so that you don't put a PDL out there, preferred drug list.
Q. Okay.
A. That's an example of the kind of negotiation that takes place in the big picture.
Q. Okay.
A. And it has an impact on decisions relative to prescription prices and Medicaid.
Q. Okay. So point taken, but I think my question was a little bit more narrower when I asked for sound policy reasons behind the, you know, the different methodology with respect to generics.
The reimbursement rate proposal, and if we can just focus on that --
MS. YAVELBERG: Objection, form.
THE WITNESS: I need a better understanding of what you're asking. I really don't understand what you're asking for.
BY MR. KIM:

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Q. Okay. Well, let me -- all right. I'll -- I'll rephrase the question.
So you testified, you know, just -- just before that there were greater margin percentages between AWP and actual acquisition costs for generics than there are for brands; correct.
A. Correct.
Q. And the AWP for brands tend to be higher than the AWP for generics; correct?
MS. YAVELBERG: Objection, form.
THE WITNESS: Correct.
BY MR. KIM:
Q. Okay. So by maintaining -- and I'm -- I'm asking whether this was a policy reason, whether it was a factual actual policy reason, but if you maintained the same reimbursement rates for both generics and brands, would you expect providers -- would that encourage providers to dispense more generics?
A. As it does today, yes.
Q. Okay. And that ultimately saves New

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Jersey Medicaid money?
MS. YAVELBERG: Objection, form.
BY MR. KIM:
Q. Correct?
A. Only if there's a -- two different reimbursement rates for generic and brand, otherwise it...
Q. If -- I'm sorry. Let me -- let me clarify that.
A. You know what I'm getting at. You have to have the policy change first.
Q. Well, let me -- let me clarify -- no, what I mean was: If you have the same reimbursement rate for brands and generics --
A. Uh-huh.
Q. -- and that en -- that those encourage providers to dispense more generics than brands --
A. Yes, it does.
Q. -- having providers dispense more generics than brands ultimately saves New Jersey Medicaid more money?

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A. Because generics are less costly than brands, yes.
Q. Now, during this time -- actually, strike that.
Let's go to Page 2 of the report, sir.
And if you look at the -- under this, there's only one section, it's called Scope and if you look at the second paragraph, sir -- let me see if you're on the right page. Looking at the --
A. Oh, of the report itself?
Q. Yeah.
A. Okay. Go ahead.
Okay. I'm there.
Q. Okay. So in the second paragraph it says, "Our review was limited to ingredient costs and did not address other areas such as the effect Medicaid business as a con -- contribution to other store sales, the cost to provide professional services other than dispensing a prescription such as therapeutic interventions, patient education, and patient -- physician

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acquisition costs were at a discount that was higher --
A. Yeah.
Q. -- off of AWP than the discount that New Jersey used off of AWP; right?
A. Yes, Eric, I would agree with that.
THE VIDEO TECHNICIAN: There are --
BY MR. BERLIN:
Q. And New Jersey --
THE VIDEO TECHNICIAN: Sorry. This is the videographer. There are two minutes remaining.
MR. BERLIN: Well, let's break right here.
THE WITNESS: Okay.
THE VIDEO TECHNICIAN: Okay.
MR. KIM: Great.
THE VIDEO TECHNICIAN: This concludes Tape Number 6 of the video deposition of Edward Vaccaro. The time is 4:18. We are off the record.
THE VIDEO TECHNICIAN: This is the

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beginning of Tape Number 7 of the video deposition of Edward Vaccaro. The time is 4:25 p.m. We are on the record.
BY MR. BERLIN:
Q. Mr. Vaccaro, relating back to the three reports that we just discussed the '84, '96 and '02 reports, did New Jersey increased its discounts off of AWP to match the discounts that were in those OIG reports?
A. I'm sure knowledge of those reports contributed to the process that led to those changes, yes.
Q. But they didn't actually increase the discounts to match the discounts that were reflected in the reports; right?
A. In the testimony in the past couple days I've indicated the time frames for changes in discounts, and to the extent that they relate to when the reports came out, they may have played a role in support offered -- in supporting a change at those times to the volume discount.
Q. Well, New Jersey Medicaid accepted the

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validity of the numbers in those reports; right?
A. Yes, they did.
Q. And what is the discount off of AWP right now in 2008?
A. It's AWP less 15 percent.
Q. So the less 15 percent is still not as great a discount off of AWP as the AWP minus 16 percent that was shown in the 1984 report 24 years ago; right?
A. You -- you are correct.
Q. So during that period of time, the last 24 years, New Jersey has known that it is paying Medicaid ingredient cost payments that are greater than the actual acquisition costs found in those OIG reports; right?
MS. YAVELBERG: Objection, form.
THE WITNESS: Yes.
BY MR. BERLIN:
Q. And is there any particular reason why New Jersey has done that other than that some of these rates were made as a point of compromise with providers?

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A. Your explanation is -- is the primary reason for not being able to move more aggressively in changing discounts rates.
Q. In other words, you would say the sole reason is that providers have stepped in and prevented New Jersey from moving the rates to more accurately reflect the discounts off of AWP shown in those OIG reports?
A. Yes.
MS. YAVELBERG: Objection, form.
THE WITNESS: Yes, that is correct.
BY MR. BERLIN:
Q. Well, if it's the provider pressure that prevented New Jersey from changing its discounts off of AWP to reflect the discounts in the OIG reports, can you think of any reason why manufacturers should be held liable for that differential?
MS. YAVELBERG: Objection, form.
THE WITNESS: I don't think I'm going to offer an opinion on that. I'm not too sure if I know enough about manufacturers' price setting

drug association met with you or met with the Department of Human Services, did they also indicate to you that they were speaking with state legislators?

A. Oh, absolutely. Absolutely. In fact, they can identify the ones they were targeting.

MS. YAVELBERG: Thank you. We'll take a short break.

THE VIDEOGRAPHER: The time is now 10:33. We're going off the video record.

(A recess is taken.)

THE VIDEOGRAPHER: The time is now 10:47. This begins videotape number 2 of the videotape deposition. You may proceed.

BY MS. YAVELBERG:

Q. In addition to drug ingredient cost, Mr. Vaccaro, is there another portion of reimbursement for pharmacy claims?

A. Yes.

Q. And what is that?

A. The dispensing fee.

Q. And what is the actual amount of the

New Jersey dispensing fee?

A. There's a base dispensing fee amount of 373 and then there are three add-on components that bring it up to a total of, well, until prior to this year 407.

Q. And when you say 373, is that $3.73?

A. Correct.

Q. And when you say 407, is that $4.07?

A. Yes.

MS. YAVELBERG: Can we take a moment to go off the record.

THE VIDEOGRAPHER: The time is now 10:47. We're going off the video record.

MS. YAVELBERG: This is a fax for me.

(Off the record.)

MS. YAVELBERG: We're ready to go back on.

THE VIDEOGRAPHER: Ready to proceed. The time is now 10:51. We're back on the video record.

BY MS. YAVELBERG:

Q. So, Mr. Vaccaro, we were just talking

about the New Jersey dispensing fee?

A. Yes.

Q. You mentioned that there's a base rate of $3.73 and then I think you referred to something called add-ons?

A. Yes.

Q. What are add-ons?

A. There are three add-ons. One is an impact allowance that some additional dispensing fee provided to pharmacies who are in high Medicaid areas. Another add-on is for 24 hour emergency dispensing and the third add-on is for patient consultation services.

Q. And you said that the maximum dispensing fee was $4.07?

A. Prior to this budget year.

Q. And this budget year, what did it change to?

A. I believe it's 3.99.

Q. And so the combination of the impact area, the 24 hour, and the patient consultation could raise the pharmacy's dispensing fee from

$3.73 to $4.07 until just this year which you think it was reduced to $3.99?

A. Correct.

Q. Is that correct? And how did a pharmacy apply for or get the add-ons?

A. Again, the FD 70 document was communicated to pharmacies and they would come back to us with an indication as to whether or not they were in an impact area, whether they provided patient consultation, and whether they provided 24 hour emergency services.

Q. And this FD 70 that you referred to, was that also used for the volume, the certification as to annual volume?

A. That's correct.

Q. The same form?

A. Yes.

Q. And that's annually?

A. That's annually, yeah.

Q. And how, the $3.73 base rate, how long has that been the New Jersey base rate for the dispensing fee?

A. Over 20 years.
Q. And how is the dispensing fee -- where is the dispensing fee written down?
A. In New Jersey Administrative Code 10:51.
Q. And if you could take a look at Exhibit 3 which we've already marked. And flip to Page 9, Section 1.7.
MR. KIM: I'm sorry. Page 9?
MS. YAVELBERG: Page 9.
THE WITNESS: The back side.
MS. YAVELBERG: You need Exhibit 3.
MS. McLAUGHLIN: It would be that one.
MR. KIM: This one, okay.
Q. Exhibit 3, Page 9, 10:51, Section 1.7, Prescription Dispensing Fee.
Do you see that there, Mr. Vaccaro?
A. Yes.
Q. And does this portion, Section 1.7 of the New Jersey Code reflect the dispensing fee for the State of New Jersey?
A. Yes, it does.

Q. And does this also reflect these add-ons that you were referring to?
A. Yes, it does.
Q. Can DMAHS administratively change that dispensing fee if it wants to?
A. No.
Q. If pharmacists complained -- I'm sorry?
A. Let me amend that prior answer.
Q. Please do.
A. DMAHS, like any of the divisions within state government, have the ability or the right to go to the register and change regulations. There would be no support for a change of regulations that impacted reimbursement unless it got the full support of the department and the Governor's Office.
Q. So DMAHS --
A. Has the ability to go to the register for the purpose of changing regulations. For example, this document is due for sunset. It has established regulations to keep it going after January 20th of next year. It would not move

forward regulations that would impact reimbursement unless it had the full support of the Department of Human Services or the Governor's Office.
Q. So it could propose, it could make proposals?
A. Yes. It can do proposals, yes.
Q. But it can't make the change without the full support --
A. That's correct.
Q. -- of the department and the Governor's Office?
A. That's correct.
Q. Thank you for that clarification. If pharmacists complained that overall reimbursement was too low and the dispensing fee needed to be raised to make up the shortfall, could DMS do that on its own?
A. No.
Q. How does the New Jersey dispensing fee compare to the dispensing fees of other states?
A. It's generally higher than other

states.
MS. YAVELBERG: I'd like to mark this next document as Exhibit 5.
(A document entitled Department of Health and Human Services dated August 12, 1994 from Director, Medicaid Bureau is received and marked as Exhibit Vaccaro 005 for identification.)
Q. Mr. Vaccaro, I'm handing you a document marked as Exhibit 5. It is dated August 12, 1994 and the heading is Department of Health and Human Services. It's from the Director, Medicaid Bureau. Subject: Expiration of Pharmacy Reimbursement Moratorium Information to All Associate Regional Administrators Division of Medicaid.
Do you see that there?
A. Yes, I do.
Q. I'd like you to look on the back side of this document and look at the paragraph near the bottom which starts at "we would also clarify".